

The Administrative Tribunal,

Considering the complaints filed by Messrs P.H. C. (his second), H.-R. G., A.J.L. H. and M. K. against the World Intellectual Property Organization (WIPO) on 23 January 2006 and corrected on 12 February, the Organization's reply of 24 May, the complainants' rejoinder of 26 June and WIPO's surrejoinder of 6 October 2006;

Considering the applications to intervene filed by:

H. A.	B.A. H.	I. P.
B.A. A.	M.C. H.	J. P.
R. A.	A. I.	M. Q.
P.J. A.	A. J.	R. R.
D. B.	P.G.E. K.	P. R.
A.C. D.	N. K.	H. R.
D. D.	J. L.	A. S.
M.-J. D.	C. L.	J.M. S.-B.
S. D. P.	J. L.	N. L M. S.
P. D.	J. M.	T. S
M. D.-Z.	G. M.	V. T
E. F.	C.-L. M.	J. T.
R. G.	F. M.	M. Z.-L.
M.-T. G.	Q.H. N.	S. Z.

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The United International Bureaux for the Protection of Intellectual Property (BIRPI) – WIPO's predecessors – had their own Pension Fund, which was set up in November 1955. When WIPO became a specialised agency of the United Nations in 1974 and its staff became participants in the United Nations Joint Staff Pension Fund (UNJSPF), the Pension Fund established by the BIRPI was closed (but not dissolved) with effect from 30 September 1975. A Foundation Council continued to manage the closed Fund, in order to preserve the rights of its members (including the payment of a supplementary pension benefit, equivalent – in very simple terms – to a percentage* of the difference between the pension paid by the UNJSPF and the pension calculated according to the

rules of WIPO (closed) Pension Fund, on the basis of a favourable exchange rate). At the material time, the closed Fund's membership included 62 retired staff members and other beneficiaries, and 12 serving staff members.

According to an actuarial evaluation at 31 December 2002, if the United States dollar did not appreciate against the Swiss franc, the capital available to the closed Fund would be insufficient to enable it to honour its long-term commitments. By letter of 17 June 2005 the President of the Foundation Council informed the members of the Fund that further measures involving a reduction of benefits had been adopted. The actuary's recommendations had been followed but, in order to attenuate the effects, the measures would be spread over three years as follows: from 1 July 2005 pensions would not exceed 94 per cent of final net salary and the supplementary pension benefit would amount – as it had since 1993 – to 85 per cent of the difference between the pension paid by the UNJSPF and the pension calculated according to the rules of the closed Fund; from 1 July 2006 the pensions ceiling would be set at 88 per cent, with the supplementary pension benefit remaining at 85 per cent; and from 1 July 2007 the ceiling would be maintained at 88 per cent but the supplementary benefit would be reduced to 80 per cent. He added that, at the request of the Director General of WIPO, who had been informed of the situation, a study was being carried out to determine possible ways of assisting the Fund. However, an internal working group, set up at the Director General's initiative to examine the matter, reached the conclusion that WIPO had no obligation towards the closed Pension Fund.

On 11 August 2005 Mr H., a serving staff member, asked the Director General to adopt measures “correcting the decisions taken by the Fund's Foundation Council”, in order to “safeguard [his] acquired rights”. He added that the “administrative decision” he was seeking could “consist in [...] a decision in principle recognising [his] right to claim compensation in due course”. On the following day Mr K., also a serving staff member, notified the Director General that he was supporting Mr H.'s views and wished to make the same request for himself. In an internal memorandum sent to Mr H. on 13 September, the Director General replied that the closed Pension Fund was a foundation established under Swiss law, governed by its own Regulations and by Articles 80 et seq. of the Swiss Civil Code, with a legal personality independent from that of WIPO, and that as far as he was aware the Organization had never undertaken to underwrite the Fund's obligations. On 9 October Mr H. asked the Director General to review his decision or, failing that, to authorise him to bring his case directly before the Tribunal. By a letter of 31 October 2005, which constitutes the decision impugned by Mr H. and Mr K., the Organization's Legal Counsel replied to Mr H. that the Director General had decided to maintain his decision but authorised him to proceed directly to the Tribunal.

In letters dated 26 August and 1 September 2005 respectively, Mr G. and Mr C., retired staff members, asked the Director General to cancel the measures taken by the Foundation Council of the closed Fund. Having received a negative reply from the Legal Counsel, they asked the Director General to review that decision or, failing that, to authorise them to bring their case directly before the Tribunal. They received the same reply as Mr H. on 12 December and 29 November 2005 respectively.

B. The complainants contend that the Director General committed an error of law in his reply to the request as expressed by Messrs H. and K., since, when asked to state his position on an obligation of the Organization towards its staff, he commented instead on WIPO's obligations to the closed Pension Fund. In their opinion, that error alone justifies referring the case back to the Organization for a new decision to be taken. They add that by arguing that the Fund is independent of WIPO, the Director General committed an error of fact and of law, since in their view there is an “organic interconnection” between the two institutions and the Fund is dependent on the Organization from a legal as well as a managerial and financial point of view. They contend that the defendant committed a further error of law by asserting that in the absence of a legal basis it was unable to assume any additional financial obligations. The complainants point out that such a basis does exist, specifically in Article 5 of the closed Fund's Rules of 23 August 1976. They accuse WIPO of refusing to assume liability for the Fund's “technical deficit”, despite having a general responsibility for the Fund's management.

The complainants also accuse the Organization of failing to comply with its obligations towards its staff, particularly the obligation to avoid causing them unnecessary or undue injury. They consider that there was also a breach of a promise, made by the Director General in a letter of 2 June 1971 addressed to all BIRPI staff following the conversion of the BIRPI into WIPO, not to diminish the rights they had acquired – a promise which fulfils all the conditions of validity established by the Tribunal's case law – and they accuse the defendant of showing bad faith. Lastly, they accuse it of a breach of acquired rights and of confiscation and despoliation with retroactive effect for retired staff, since the structure of the “implicit contract of retirement” has been upset. They make it clear that their intention is to challenge not the decisions of the Foundation Council based on an actuarial study but

WIPO's decision to evade its responsibilities and obligations, even though in regard to its own financial situation the cost entailed by the necessary measures was insignificant. They contrast this insignificant cost for the Organization with the present or future considerable loss they face as a result of the measures taken.

The complainants ask the Tribunal "to quash the Director General's administrative decisions not to intervene – or not to undertake to intervene – in order to offset the effects of the Foundation Council's decisions implemented on 1 July 2005, 2006 and 2007" and to refer the case back to the Organization for a new decision to be taken with a view to preserving all their rights. They also claim 10,000 Swiss francs each in costs.

C. In its reply WIPO submits that the Organization and the closed Pension Fund have different legal personalities. This is clear, in its view, from the observable differences regarding not only their foundation, their goals, their legal regime, their method of administration and their financing arrangements, but also the amendment procedures applicable in each and their manner of determining employees' and employer's contributions. There is no indication anywhere that WIPO's assets may be used to pay off the closed Fund's deficit. It would indeed be unacceptable for an independent foundation to be able to take decisions that give rise to legal obligations for the Organization. If the founders of the Fund had intended to oblige WIPO to pay off the deficits, they would certainly have made that intention clear. According to the Organization, it is the Fund's solvency that is at issue in the present case, and not third-party liability.

WIPO also points out that, as far as serving staff members are concerned, the action is premature since they have suffered no injury. It adds that the concept of a "technical deficit", for which the BIRPI had recognised the employer's liability and which the complainants apparently wish to extend to problems of exchange rate fluctuations, in fact applies only to the deficit due to the retirement of staff members before the age of 65. As for the promise which the Director General is alleged to have made in 1971, although the latter did state that the rights enjoyed by BIRPI staff members would remain "entirely acquired and [would] not be diminished in any way", the complainants do not show that those rights included the right to be refunded in the event that the closed Pension Fund incurred a deficit. A right must be shown to exist before it can be considered "acquired". Lastly, WIPO retraces in detail the difficulties encountered with the management of the closed Fund and points out that at no time – not even in 1993 when, already faced with problems of insolvency, the Fund had reduced the benefits paid out to its beneficiaries – was it considered that the Organization had an obligation to cover the deficit. At the time, the complainants in fact had not protested, and to that extent it may be considered that their action is not only unfounded but also time-barred.

D. In their rejoinder the complainants accuse WIPO of pleading "at cross purposes" insofar as it devotes the bulk of its reply to its lack of liability for the closed Pension Fund whereas they had concentrated on the protection of their own rights and the Organization's obligations towards its staff. In so doing it is shifting the ground of the dispute as far as its subject, object and origin are concerned. In the complainants' view, the reply, apart from being tainted with many errors of fact and of law, therefore shows a clear misappraisal of the facts and abuse of authority. This leads them to the conclusion that the solution of referring the case back to the Organization for a new decision to be taken is perhaps not ideal, and they ask the Tribunal to consider the possibility of ordering WIPO to pay them – or to undertake to pay them in due course – their income shortfall arising from the decisions to reduce benefits. They contend, moreover, that the defendant's plea that their action is both premature and time-barred is "untenable".

The complainants accuse WIPO of showing bad faith by distorting their arguments and by deliberately failing to produce a vital piece of evidence, namely a letter from the Director General to the President of the Fund's Foundation Council, dated 12 April 2002, which they believe shows that the Organization acted disloyally towards the Council. They also accuse the Director General or his representatives of abuse of authority insofar as they express an opinion in the reply on a matter for which the Organization's deliberative organs (that is to say the Member States) are competent, without having consulted the latter. The bias which in their view permeates the reply misled its authors into several errors of fact and of law as well as into an obvious mistake of interpretation and induced them to express "baseless, disloyal and libellous" criticism of the Fund's management and of the members of the Foundation Council. They add that some of these flaws also account for the Organization's "equivocations" and its lack of support for the Fund. They denounce "the hostile attitude towards members of the closed Fund".

They maintain that there are undoubtedly organic links between the Organization and the Fund and that there is a "specific legal basis" which obliges WIPO to pay special contributions to the closed Pension Fund in the event of a

deficit. This legal basis arises from Article 5 of the closed Fund's Rules of 23 August 1976, which reads as follows:

"The resources of the WIPO Pension Fund include any contributions paid in by WIPO [...], any contributions paid in by its members [...]."

As the Director General of WIPO stated, speaking as a member of the Foundation Council, at the latter's 63rd session in 1976, the word "contribution" was used deliberately in order, according to the minutes of the session, "to allow for the payment of special contributions by WIPO [...] in the event that the financial stability of the Fund should require it". The payment of such contributions was also intended to offset the fact that the Council was forfeiting some of the contributions paid by the employees and by the employer. In the complainants' view, the defendant's reply shows "complete ignorance of the law of the international civil service" as well as ignorance of the Tribunal's case law. Referring to the assertion that it would be unacceptable for an independent foundation to be able to take decisions that give rise to legal obligations for WIPO, they point out that this is actually the case with the UNJSPF and the International Civil Service Commission.

E. In its surrejoinder the defendant argues that there is no trace of the right claimed by the complainants either in WIPO's Staff Regulations and Rules or in the Regulations and Rules of the Pension Fund. Their pleadings regarding an alleged legal basis are unfounded since, apart from the fact that the Article 5 they cite does not support their arguments, the Organization cannot be bound by the rules of a separate legal entity. It reiterates that it has no obligation to intervene on behalf of the closed Fund and maintains that no assurance was ever given in that respect, either by the Organization or by its Director General; contrary to the view put forward by the complainants, it considers that the term "contribution" is neutral and does not imply any obligation of that kind. It contends that the letter of 12 April 2002, in which its constant position is presented without ambiguity, does not support the complainants' arguments. As far as the alleged abuse of authority is concerned, WIPO asserts that it lies at the Director General's discretion to decide what should or should not be submitted to the Member States. It adds that the complainants "have no authority to make comments" in that respect and that the Tribunal "is not competent to examine such an allegation".

It denies any bias in the drafting of the reply or any criticism of the members of the Foundation Council. It maintains that referring the case back to the Director General would be pointless and states that it hopes that the Tribunal's decision will provide an answer to the question raised by the complainants and will bring the matter to a close. It undertakes to comply with whatever ruling the Tribunal sees fit to hand down.

CONSIDERATIONS

1. WIPO, which took over from the BIRPI, became a specialised agency of the United Nations in 1974. The Organization's staff members then became participants in the UNJSPF. Under the terms of an agreement signed by the Director General of WIPO, the representatives of the UNJSPF's Board and the President of the Foundation Council of the WIPO Pension Fund, which until then had been responsible for receiving contributions and paying benefits, the assets required to cover the UNJSPF's liabilities were transferred to the latter. Part of the assets, however, amounting to approximately 3 million Swiss francs, remained available to the WIPO Pension Fund in order to guarantee, according to the report submitted by the Director General to the 11th session of the Coordination Committee of WIPO held from 26 September to 4 October 1977, "[a]ll rights acquired, under the Regulations and Rules of the WIPO Pension Fund, by staff members whose appointment took effect prior to October 1, 1975 – that is, prior to the entry into force of Staff Regulation 6.1*bis* which provided for participation in the UNJSPF". In order to ensure that staff members recruited before 1 October 1975 would retain the rights they had acquired under their pension scheme, which was considered more advantageous than the common scheme of the United Nations, it was provided firstly that those officials should participate in both schemes, secondly that the WIPO Pension Fund would take in no more members after 30 September 1975 and would thus become "closed", and thirdly that the closed Fund would if necessary pay supplementary pension benefits amounting to a percentage of the difference between the amount calculated and received under the UNJSPF rules and the amount calculated according to the rules of the closed Fund.

2. The closed Fund's financial situation deteriorated, especially on account of the falling value of the United States dollar, against which the pensioners were protected, and owing to the fact that the method used to calculate the supplementary pension benefits could have the effect of allowing some retired staff members to receive

pensions in excess of their final net salary. The closed Fund's Foundation Council amended the Rules of the Fund from 1 July 1993 in order to limit, on the one hand, the total pension benefit to 100 per cent of the final net salary and, on the other hand, the supplementary benefit to 85 per cent of any difference between the amount due under UNJSPF rules and the amount calculated according to the Rules of the closed Fund of 1 January 1975.

These austerity measures are not directly at issue in this dispute. However, after an actuarial evaluation had revealed the precarious state of the closed Fund's finances and the difficulties it was likely to face in the future, particularly as a result of the falling value of the dollar, the Foundation Council took further measures, which were notified on 17 June 2005 by the President of the Foundation Council to all members of the closed Pension Fund: according to a timescale agreed by the actuary of the Fund, the pension would not be greater than 94 per cent of final net salary from 1 July 2005 and 88 per cent from 1 July 2006, while the supplementary pension benefit would be limited from 1 July 2007 to 80 per cent of the difference between the amount due under UNJSPF rules and the amount to which the pensioner would be entitled under the closed Fund Rules of 1 January 1975. The President of the Foundation Council added in his letter of 17 June 2005:

“The Director General of WIPO has been informed of the situation and of the measures envisaged to reduce the supplementary [pension] benefits, as a result of which he has asked for a study to be conducted regarding possible ways of assisting the Fund, either by providing a guarantee to cover the technical deficit, or by paying in subsidies. This study is currently under way.”

3. Two serving staff members of WIPO asked the Director General on 11 and 12 August 2005 to take steps “correcting the decisions taken by the Fund's Foundation Council” in order to safeguard their acquired rights. Referring to the Tribunal's case law, they requested that a decision in principle be taken, recognising their right to claim compensation in due course. In letters dated 26 August and 1 September 2005, two retired staff members asked the Director General to rescind the decisions of the Foundation Council, which had the effect of substantially reducing the amount of the supplementary pension benefits they were receiving. To these requests the Organization replied that it owed no obligation to the Fund, which had an independent legal personality, and that the Administration was not competent to quash decisions taken by the Foundation Council. Later the Director General maintained those decisions and authorised the complainants to proceed directly to the Tribunal.

4. The complainants filed a complaint with the Tribunal asking it to quash the Director General's “administrative decisions not to intervene – or not to undertake to intervene – in order to offset the effects of the Foundation Council's decisions implemented on 1 July 2005, 2006 and 2007”, and to refer the case back to the Organization “to take a new decision, at its discretion, for the purpose of maintaining the full rights of the complainant[s]”.

5. Forty-two staff members or former staff members of WIPO have applied to intervene in the complaints. Insofar as their factual and legal position is identical to that of one of the complainants, their applications to intervene are receivable.

6. In rejecting all liability in the dispute before the Tribunal, the Organization recalls that its legal personality is distinct from that of the Pension Fund, so that despite “a close working relationship” between the two institutions it has no duty to review the decisions taken by the Foundation Council or to cover the Fund's deficits. The Tribunal acknowledges that it is not competent to review the decisions of the closed Fund, which is a foundation established under Swiss law and which is subject to the supervision of the Swiss federal authorities. But the complainants' claims are directed against WIPO, which they accuse of failing to intervene in order to safeguard the rights which they believe they hold as a result of the commitments made for their benefit and the Organization's liability for the Fund's actuarial deficit. The Tribunal is competent to rule on these claims.

7. The defendant appears to challenge the receivability of the complaints. On the one hand it holds that the complainants' action is “time-barred” on the grounds that they failed to present the Organization with a “request to bail out the Fund” when the initial measures reducing benefits were taken in 1991 and 1993. It is clear, however, that their failure to act on that occasion cannot have the effect of depriving them of the right to challenge the Organization's subsequent position with regard to austerity measures taken in 2005. On the other hand, the defendant contends that the staff members who are still in service have not yet suffered any injury as a result of the adoption of those measures and that their complaints are therefore premature. Yet according to precedent (see for example Judgments 1330 and 2204), staff members have an obvious interest in ascertaining the value of their pension rights as soon as possible, even if they are still serving: the receivability of their action does not depend on

proving actual and certain injury, but on their having an interest in obtaining recognition of their future rights, regardless of whether their pleadings are well founded.

8. Some of the complainants' pleas as well as some of WIPO's defence arguments may conveniently be discarded before the main issue is broached, that is, the question of whether, in the circumstances of this case, the Organization failed to take the necessary measures to safeguard the rights which the complainants derive from contractual and statutory provisions and from general principles of law.

9. Thus, contrary to the complainants' main plea, the Director General committed no error of law by replying to their requests that WIPO owed no obligation to the Fund instead of commenting on the Organization's obligations towards its staff. Whether this position is well founded or not – the question will be dealt with in due course – WIPO did respond, without misrepresenting them, to the complainants' demands that it should adopt measures to remedy the decisions taken by the Foundation Council, with the aim of safeguarding their acquired rights.

10. Similarly, while it is true that there are close links between the Organization and the closed Pension Fund, they are still two different institutions and the latter is in no way dependent on the former. None of the texts concerning the relations between the two institutions provides that the Organization has an obligation to cover the Fund's technical deficit – which does not imply that it is not allowed to make “contributions” to the Fund.

11. Lastly, the complainants cannot rely on a draft letter dated 20 December 2001 in which the Director General allegedly stated that he was prepared to ask the Member States of the Organization to consider a request by the Fund to cover the deficit apparently attributable to the application of WIPO Regulation 3.15(b). That draft was not signed and the defendant's official position with regard to the closed Pension Fund is stated by the Director General in a letter of 12 April 2002 pointing out that WIPO had no financial liability for the Fund and concluding that, “[s]hould an actuarial deficit ever appear, [his] collaborators and [him]self [would] naturally be prepared to look at possible solutions when the time [came]”.

12. With regard to the defendant's pleadings, the Tribunal cannot accept the view that it is simply a question of the Fund's solvency and not of the Organization's responsibility towards its serving or retired staff members. It follows, then, that any discussion about possible mismanagement on the part of the Fund, or the fact that the members of the Fund are “privileged” and cannot complain about the workings of a system that has existed for over 25 years and against which they never protested, either at times of “euphoria” or when deficits were revealed, is irrelevant and the Tribunal will not dwell on the pleadings of the parties in that respect.

13. The only real issue is that of whether the complainants may derive, either from their contract of employment, or from the applicable regulations, or from promises which, by virtue of the circumstances in which they were made, are binding on the defendant, the right to obtain a supplementary pension benefit amounting to a given percentage of the difference between the pension calculated under UNJSPF rules and that calculated according to the rules of the closed Pension Fund, and whether, in the event of the latter's default, the Organization has an obligation to intervene either directly or indirectly.

14. When WIPO was established as the successor of the BIRPI, the latter's Staff Regulations and Rules were abrogated as from 29 September 1970, but the staff members whose appointment with the Organization was confirmed succeeded in maintaining the rights they had acquired under the previous system. The then Director General wrote on 2 June 1971 to one of the complainants, currently retired, and probably to all staff members in the same situation, in the following terms:

“Your terms of employment are governed by the Staff Regulations and Rules of WIPO. It is understood that the rights you enjoyed as a staff member of the BIRPI are entirely acquired and will not be diminished in any way.”

This commitment undoubtedly gave certain rights to the staff members who were thus transferred to the new Organization, as well as a guarantee that those having completed at least ten years of service could retire from the age of 60, with the BIRPI and subsequently WIPO having an obligation to reimburse the Pension Fund in respect of pensions paid by the latter to retired staff who had not yet reached the age of 65 in the event that such payments gave rise to a technical deficit. But apart from that guarantee, which stemmed from an agreement of 24 April 1970 between the BIRPI and the Pension Fund, the commitment was not intended to freeze the method of calculation or the amount of the pensions paid to transferred staff, or to benefit staff recruited after WIPO was established. The

plea regarding the rights the complainants claim on the basis of the letter of 2 June 1971 therefore fails.

15. On the other hand, the complainants are right to argue that it was the Staff Regulations which determined that staff members whose appointment took effect prior to 1 October 1975 – the date at which the Fund was “closed” – would become participants in the UNJSPF and, according to Regulation 6.1, “for the purposes, if any, provided for in the Regulations and Rules of the WIPO Pension Fund, in the WIPO Pension Fund”. According to the report mentioned in consideration 1 submitted by the Director General to the Coordination Committee in September-October 1977, “[a]ll rights acquired” by the staff members concerned were maintained and “guaranteed by the WIPO Pension Fund”. Even though the then Director General did not specify that the Organization was to some extent liable for that guarantee, the fact that he expressly mentioned the maintenance of all acquired rights can hardly be regarded as being devoid of effect. It is true, as the Organization points out, that there is no provision which obliges it to make good the deficit of the closed Pension Fund in order to maintain the level of the supplementary pension benefits paid to retired staff and to ensure the Fund’s solvency in the future. Moreover, the measures taken by the Fund to cover its actuarial deficit are perfectly understandable. It would appear, however, that in the event a significant proportion of the past deficits, which led to the financial situation that the Fund had to try to remedy, arose as a consequence of a Staff Regulation that was intended to protect pensionable remuneration, and hence the “guaranteed” salary of officials in the professional and higher categories, against any fall in the value of the dollar. In its present form, Regulation 3.15(b) is worded as follows:

“Where, as a result of a variation in the exchange rate between the Swiss and the United States currencies, the amount of the pensionable remuneration of a staff member, whose appointment took effect before October 1, 1975, as expressed in Swiss francs would, for any given month, be less than for the preceding month, the latter amount shall continue to be the amount of the pensionable remuneration until the month for which, for any reason, the staff member’s pensionable remuneration reaches the amount applicable prior to the said variation.”

Thus, as a result of what both parties describe as a “ratchet effect”, the benefits paid by the closed Fund were increased as the dollar fell. According to the firm of accountants commissioned in 1992 to assess the Fund’s financial situation, “the guaranteed salary depends in particular on the exchange rate [between the Swiss franc and the United States dollar]. For example, if the exchange rate of the dollar rises, the guaranteed salary of professionals is raised in the same proportion. If the dollar then falls back to the same value as before, however, the guaranteed salary does not return to its previous level. Upward fluctuations in the dollar lead to rises in the guaranteed salary, while downward fluctuations do not cause any change in the guaranteed salary; this can give rise to substantial increases in benefits which are practically not funded by contributions.”

16. It is quite clear that it was this mechanism which led to the closed Fund’s financial difficulties, and the defendant cannot absolve itself of all responsibility for the fact that the complainants’ rights have been diminished, since this effect is largely due to the application of the Staff Regulations which it adopted and which, as it makes clear, it has no intention of giving up. The Tribunal notes, moreover, that the Fund has received no employees or employer contributions since 1993, for reasons which the defendant in its reply terms “mysterious”, although it accepted the measure at the time. At any event, the estimates made when the Pension Fund was closed, according to which the remaining balance of the Fund would be sufficient to “cover [its] commitments”, do not appear with hindsight to have been sufficient.

17. In view of all the circumstances of the case, the Tribunal considers that, even though the closed Pension Fund – which is not a party to this dispute – cannot be criticised for having taken measures to make good its actuarial deficit, WIPO must be held liable because of the fact that it did nothing to safeguard the rights of its staff members and former staff members to a supplementary pension benefit. The complainants accept that the austerity measures taken in 1993 were based on wise management principles, and they merely seek a review of their situation with respect to the measures implemented from 1 July 2005. The Tribunal considers that the Director General, in conjunction with WIPO’s closed Pension Fund, should examine what contribution would be required either to pay the sums which would have been owed to retired staff if the disputed measures had not been taken, or to eliminate the Fund’s actuarial deficit. Should such a solution not be feasible, the Organization shall pay directly to the complainants the amounts to which they would have been entitled had the remedial measures applied in 2005 not been introduced. It must also guarantee that staff members who are still serving are able, when the time comes, to enjoy the same rights (see in this respect Judgment 986).

18. The Tribunal does not accept the defendant’s argument that it lay within its discretionary authority to refuse to intervene, since – as it contends – it had no legal obligation to do so: it does have a duty to safeguard the rights

of its staff members, and that is not a matter of choice. The complainants' accusations that the defendant acted in bad faith must also be rejected. In fact it has merely defended its position, while producing all the necessary documents and making it clear that in this delicate matter it "undertakes to comply with whatever ruling the Tribunal sees fit to hand down".

19. As the complainants succeed, they are entitled to costs, which the Tribunal sets at an overall sum of 5,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decisions are set aside.
2. The case is referred back to the Organization for the measures prescribed under 17 above to be implemented.
3. The applications to intervene are allowed insofar as the factual and legal position of the interveners is identical to that of one of the complainants.
4. WIPO shall pay the complainants the overall sum of 5,000 Swiss francs in costs.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

* Until 1 July 1993 the rate was 100 per cent. Following the introduction of austerity measures to restore the Fund's balance, the rate was reduced on that date to 85 per cent. At the same date a ceiling was set for retirement pensions at 100 per cent of the final net salary. In addition, any contribution ceased to be due.